

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, ex rel. )  
MARY HENDOW and JULIE ALBERTSON, ) 2:03-cv-0457-GEB-DAD  
Plaintiff, )  
v. ) ORDER\*  
UNIVERSITY OF PHOENIX, )  
Defendant. )  
\_\_\_\_\_ )

Defendant moves to have language included in the Order filed August 17, 2007 ("Order") which would authorize Defendant to pursue an interlocutory appeal of that Order in this qui tam action. The Relators oppose the motion.

An order may be certified for interlocutory appeal when it "involves a controlling question of law as to which there is substantial ground for difference of opinion and [] an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

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\* This matter was determined to be suitable for decision without oral argument. L.R. 78-230(h).

1 Defendant argues the Order conflicts with the Ninth  
2 Circuit's decision in United States ex rel. Barajas v. United States,  
3 258 F.3d 1004 (9th Cir. 2001), and the Sixth Circuit's decision in  
4 United States ex rel. Bledsoe v. Cmty. Health Sys., Inc., 342 F.3d 634  
5 (6th Cir. 2003). The Order states in pertinent part: "Since the  
6 [settlement agreement negotiated between Defendant and the Department  
7 of Education ("Settlement Agreement")] did not constitute an  
8 'election' of an 'alternate remedy' by the 'Government' within the  
9 meaning of the [False Claims Act ("FCA")], the Relators' action is not  
10 moot." (Order at 3:23-4:1.) At issue is whether the Settlement  
11 Agreement effectively settled the FCA claims in the pending action.

12 The Relators in the pending action point to language in the  
13 Settlement Agreement which explicitly excluded the pending FCA claims  
14 from the settlement. (Relators' Opp'n to Def.'s Mot. for Interloc.  
15 App. at 8.) Therefore, Defendant has not shown that the Order  
16 conflicts with either Barajas or Bledsoe. In Barajas, the government  
17 declined to intervene, but the Air Force subsequently entered into a  
18 settlement agreement "for precisely the same problem" involved in that  
19 qui tam action. Barajas, 258 F.3d at 1011. Barajas concluded that  
20 "[u]nder the circumstances . . . construing [the settlement] as an  
21 'alternate remedy' under the FCA [was] inconsistent with both the  
22 plain language and the purpose of the statute." Id. at 1013-14.  
23 Additionally, in Bledsoe the court held that the settlement in that  
24 qui tam action concerned "the same FCA claims," and therefore  
25 constituted an "'alternate remedy' for purposes of 31 U.S.C.  
26 § 3730(c)(5)." Bledsoe, 342 F.3d at 649.


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1           Since Defendant has not shown that the Order involves a  
2 controlling question of law as to which there is substantial ground  
3 for difference of opinion, the motion is denied.

4           IT IS SO ORDERED.

5 Dated: January 7, 2008

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8 GARLAND E. BURRELL, JR.  
United States District Judge